

substantial and material question of fact exists as to whether Scripps committed misrepresentation and/or lacked candor by doing so.

**C.   Scripps' Past Adjudicated Employment  
Discrimination Requires the Addition of  
an Appropriate Issue**

46.   Section 73.2080 of the Commission's Rules forbids broadcast licensees from discriminating in employment. Violations of FCC rules bear directly on the Commission's character analysis. See Character Statement, 102 F.C.C.2d at 1209.

47.   In this case, Scripps' television station in Memphis has been adjudicated guilty by a competent court of what the judge found to be "pervasive, continuing, invidious and on-going discrimination." Again, it is no answer that this finding was vacated pursuant to an out-of-court settlement. See Focus Television Corp., supra, 98 F.C.C.2d at 552 n.11. Indeed, since racial employment discrimination is a violation of Commission rules, an adjudicated finding of discrimination is not necessarily required.

48.   What is important is that a competent trier of fact found Scripps, in the Myron Lowery case, to have engaged in a "worst-case scenario of sophisticated and subtle racism in private sector employment." This scathing finding of serious racial discrimination -- which was never undermined on its merits but was vacated only due to a settlement -- demands an inquiry of its impact on Scripps' qualifications to be a licensee.

D. **An Abuse of Process Issue Should Be Added Against Scripps for Its Abusive Conduct Against Four Jacks and Its Principals**

49. The Commission has often emphasized that "any attempt to harass, frustrate or obstruct the prosecution of a competing application will not be condoned." See Rocket Radio, Inc., 56 F.C.C.2d 238, 242 (Rev. Bd. 1975) (abuse of process issues added against applicant who, inter alia, attempted to obstruct competing applicant's efforts to obtain a building permit for its tower site); see also WIOO, Inc., 28 R.R.2d 685 (Rev. Bd. 1973) (abuse of process issue added where applicant's principals interfered with owner of competitor's tower site). Moreover, the Commission's Character Statement emphasizes that "such misconduct as the filing of strike applications and harrassment [sic] of opposing parties, which threatens the integrity of the Commission's licensing processes, will also . . . be considered as bearing on character." Character Statement, 102 F.C.C.2d at 1211.

50. The attached evidence indicates that Scripps has engaged in precisely the type of conduct described above with respect to Four Jacks' application. First, Scripps submitted purely abusive and harassing objections against routine pro forma assignment applications concerning other stations owned by Four Jacks' principals. Scripps even went so far as to groundlessly object to the incidental assignment applications for microwave facilities associated with WBFF(TV), Baltimore -- ultimately causing a serious hindrance to that station's ability to provide its viewers with programming of high importance to its viewers

(i.e., on-site feeds from the brand-new Baltimore baseball park).<sup>5/</sup>

51. Scripps' petitions against the routine assignment applications (including incidental microwave applications) for consent to a corporate reorganization were obvious attempts at retaliation against Four Jacks' principals. Not only did Scripps lack any procedural right to file a petition for reconsideration against the pro forma assignment applications involved, but Scripps did not even attempt to show its standing to make its challenge. Scripps is represented by experienced communications counsel, who knew or should have known that the "concerns" raised by Scripps were totally inapplicable in a purely ministerial pro forma assignment pursuant to a corporate reorganization. The economic motivation of Scripps in filing its objections is clear. By tying up Four Jacks' principals in lengthy litigation over these routine assignment applications, Scripps could substantially impede Four Jacks' principals economically, affecting not only the operation of their present television stations, but also their attempts to prosecute Four Jacks' Baltimore application.

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<sup>5/</sup> Scripps' objections also qualify as "strike" petitions under Commission standards. Three fundamental factors in determining whether a pleading is a "strike" filing are (i) the absence of any reasonable basis for the allegations in the petition; (ii) economic motivation indicating a delaying purpose; and (iii) other conduct of the licensee. Radio Carrollton, 69 F.C.C.2d 1139, 1151 (1978), clarified, 69 F.C.C.2d 424 (1978), aff'd sub nom. Faulkner Radio, Inc. v. FCC, No. 79-1749 (D.C. Cir. Oct. 15, 1980), cert. denied, 450 U.S. 1041 (1981). As shown herein, Scripps' objections meet each of these criteria.

52. Moreover, the other conduct of Scripps makes clear Scripps' abusive intent. Circumstances indicate that Scripps instigated the filing of an application by WPOC(FM), a tenant on the proposed Four Jacks tower, to lower the height of that tower -- an application filed without the authority of the tower owner (a corporation owned by Four Jacks' principals), and in direct hindrance of Four Jacks' proposal to use the full FAA-cleared tower height. Scripps' involvement is apparent from its sudden "interested" participation in the proceeding, by the fact that WPOC(FM) copied Scripps on all its correspondence despite Scripps' having no apparent stake in the matter, and by the fact that Scripps placed the tower height into issue a month later in a petition to deny Four Jacks' application.

53. Furthermore, the evidence shows that Scripps contacted a representative of another tenant on the Four Jacks tower, trying to obtain a false statement that the tower was fully loaded. In KHYM Broadcasting Co., 42 R.R.2d 1038 (ALJ 1978), the Judge added an issue to determine whether an applicant "has abused the Commission's processes by improperly interfering or attempting to interfere with [its opponent's] use of its proposed transmitter site." The issue was added upon evidence that the applicant gave the tower owner false information and solicited a

antenna, using as leverage Scripps' own false characterization as to what Mr. Bezold said regarding the subject.

54. Moreover, Scripps' efforts at obstruction did not end there. Scripps retained an engineering firm to perform a "structural study" of the Four Jacks tower, which apparently was conducted without the tower ever having been seen or visited. The resulting study, as Four Jacks has previously pointed out, is rife with errors. Even worse, it is obvious that Scripps submitted the flawed study it commissioned to Baltimore County land use officials -- who had expressed no objection to the tower in the over twenty years of its existence -- in an unsuccessful attempt to block Four Jacks' use of the tower. Clearly, Scripps' actions have gone far beyond the bounds of permissible investigation, and well into the realm of malicious obstruction of Four Jacks' venture.

55. In sum, the same abusive and obstructive pattern of conduct toward potential competitors that has pervaded all of its media activities has already been made obvious in Scripps' conduct toward Four Jacks and its principals. Scripps has willfully and improperly attempted to impede Four Jacks' prosecution of its mutually exclusive application and other applications filed by principals of Four Jacks, and thereby has abused the Commission's processes. An appropriate issue should be specified to determine the impact of Scripps' actions on its basic qualifications.

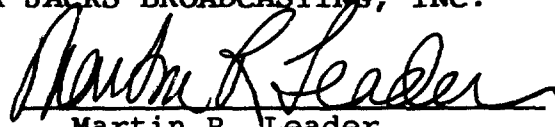
Conclusion

This case strikes at the very heart of the Commission's character policies. As shown herein, Scripps has been adjudicated guilty of anticompetitive activity, and has settled out many additional allegations of such misconduct. Scripps has engaged in "invidious," "worst-case" employment discrimination. Scripps has failed to disclose adverse adjudications made against it. And Scripps has abused the Commission's processes through malicious attempts to obstruct its competition in the instant case. The question is whether Scripps is the type of licensee that deserves to be entrusted with the license of WMAR-TV. That question demands exploration through hearing in this case. Accordingly, Four Jacks urges the Commission to grant this Petition and add the requested issues against Scripps.

Respectfully submitted,

FOUR JACKS BROADCASTING, INC.

By:



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Dated: May 13, 1993



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# Federal Communications Commission

Federal Communications Commission  
Office of the Secretary

WASHINGTON, D.C.

*Handwritten:*  
10/27/90  
F.A.D.  
11/23/90

In re

Applications for  
Renewal of License

Station KUPL(AM)  
Scripps Howard Broadcasting Co.  
Portland, Oregon

Station KUPL-FM  
Scripps Howard Broadcasting Co.  
Portland, Oregon

To: Chief, Mass Media Bureau

File No. *FILE 1*

File No. OR BRH-901002D8

PETITION TO DENY

PACIFIC WEST CABLE TELEVISION

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## SUMMARY

This Petition to Deny is entered against the applications for renewal for stations KUPL, AM and FM, that are licensed to Scripps Howard Broadcasting. Petitioner is a cable operator involved in head-to-head competition in Sacramento with a Scripps cable affiliate.

After lengthy trial in 1987, a federal jury found improper the process by which Scripps was able to win the valuable cable franchise for the Sacramento market. The process, in which Scripps participated and used its paid-for local fixers in an attempt to influence the award, was labeled by the jury as an illegal scheme to trade a monopoly franchise for various payments. And all of that illegal activity had to do with seeking to "enhance the speech of some while burdening the expression of others" (language quoted from judge's opinion following special jury verdicts).

Since the misconduct had to do with manipulating "first amendment values" (from same opinion), it was believed that the Commission would deem it of special concern when considering whether to entrust Scripps with a broadcast publishing enterprise. The matter was brought to the Commission's attention in a 1987 Petition to Deny the renewal of Scripps station KSHB-TV. But, although the Petition was subsequently withdrawn, the Commission's Video Services Division found that there were "no substantial and material questions of fact" to "warrant any further inquiry."

With this Petition to Deny the renewals for KUPL, AM and FM, PacWest is asserting that, having failed to shut out cable competition on the first go-round in Sacramento, Scripps has been engaging in cutthroat schemes to destroy PacWest's competition by every means and at any price. PacWest again has litigation under way against Scripps, herewith tenders new evidence of the improper purpose of Scripps to "defeat any and all overbuilders" in order to "retain a 100% market share" (quoted from a Scripps internal memorandum, herewith Exhibit V at Tab B). That declaration of company intent, it is believed, will surely be of timely interest to today's FCC that is bent on the cultivation of competition to the cable monopoly.

PacWest contends that this contest over the renewal of broadcast licenses is at the pleading stage, and that it has offered enough evidence of a long and enduring pattern of anti-competitive conduct by Scripps to warrant designation for hearing. At trial, PacWest is prepared to act as private attorney-general and to offer all of the testimony and exhibits that will support its pleading.

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**Federal Communications Commission**

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Office of the Secretary

WASHINGTON, D.C.

In re	)	
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Scripps Howard Broadcasting Co.	)	
Portland, Oregon	)	
	)	
Station KUPL-FM	)	File No. OR BRH-901002D8
Scripps Howard Broadcasting Co.	)	
Portland, Oregon	)	
	)	
To: Chief, Mass Media Bureau	)	

PETITION TO DENY

Licenses in Dispute

1. Pacific West Cable Television (hereinafter referred to as PacWest), a California joint venture that is licensed to provide cable TV service in the City and County of Sacramento, now petitions to deny the applications by Scripps Howard Broadcasting Company to renew the licenses for broadcast stations KUPL, AM and FM, in Portland, Oregon. The licenses for the stations are due to expire on February 1, 1991; applications to renew are pending.

Petitioner's Willingness to Act  
as Private Attorney-General

2. An earlier 1987 effort to draw the Commission's interest to what is so clearly anti-competitive conduct by this broadcast licensee was declined in an action at staff level that



PacWest with attempting to punish for, to retaliate against, and to deter PacWest's competition to its cable operation in Sacramento.

New Evidence of Licensee Misconduct in this  
Second Attempt to Draw Commission's Attention

4. This is a second attempt, arising from the same environment, to draw the Commission's attention to the abusive conduct that this broadcast licensee is associated with. The gross and openly anti-competitive dealings of Scripps to defeat competition in Sacramento was the subject in 1987 of objections to the renewals of Scripps broadcast properties in Kansas City, Missouri (BRCT-871001KH) and in Cincinnati (WCPO-TV), Cleveland (WEWS), and Detroit (WXYZ-TV). With this subject petition to deny the renewals for KUPL, AM and FM, PacWest now offers new and additional evidence of the persistent disposition of Scripps improperly to destroy competition. It is also of heightened pertinence that the Commission's urgent interest in nourishing competition by video distribution systems that include MMDS service to compete with cable is being deliberately checked in this instance. That is the case because PacWest, in an effort to cover the market quickly, has resorted to the use of MMDS technology and is now offering a competitive service that uses both the wire and wireless technologies to reach the Sacramento community. But, Exhibit II at Tab B describes in detail how Scripps is defeating the PacWest operation by offering incentives and terms to potential PacWest MMDS customers that are considerably more favorable than are offered to other Scripps customers and that are clearly designed to drive out the MMDS

competition.

5. Intemperate pricing concessions in an attempt to head off PacWest's MMDS competition are only part of a larger tapestry of the anti-competitive strategy of the Scripps cable affiliate. Soon after PacWest entered its MMDS phase, it was notified that the TNT program service, that it had been lawfully carrying pursuant to an earlier agreement, would no longer be available. The circumstances recited in the litigation entered against the Turner enterprises strongly make the case that the Scripps cable system in Sacramento was involved in the pressure to deny the TNT service to PacWest. Since the TNT channel is deemed to be critical to the continued vitality of PacWest's MMDS service, suit was instituted seeking a determination of PacWest's contractual right to continue to offer TNT. (Exhibit VII at Tab B is a copy of the complaint in PacWest v. Turner).<sup>1</sup>

6. This is the specimen case of conduct in direct contravention of the Commission's avowed interest "to enhance the vitality and competitive stature of wireless cable." Cable Report, MM Docket No. 89-600, at para. 100. (FCC 90-276, released July 31, 1990). There is little point to the Commission's opening up MMDS access to more channels (Report and Order, in Gen. Dockets Nos. 90-54 and 80-113 (FCC 90-341, released October 26, 1990)) if the real-world stopper of ruinous anticompetitive response from the existing

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<sup>1</sup> PacWest is continuing to offer the TNT channel pursuant to an agreement with the Turner enterprises to continue the service until the case is concluded.

cable monopolist is left to have the last word. It will not require new rule-making for the Commission to deliver the message that the cable conduct of Scripps in Sacramento is unacceptable. A designation for hearing in this case would magically restore a semblance of order to the conditioned angry response of existing cable to any semblance of real competition.

PacWest Standing to Petition

7. PacWest has standing to solicit the Commission's attention to what past conduct suggests may be expected over the

without further inquiry. PacWest requests that that further inquiry be conducted in the form of a hearing at which it will produce all of the evidence to demonstrate the unsuitability of Scripps to be a licensee. Clearly, PacWest cannot be expected at this stage to offer up all of the testimony and documentation that would more appropriately be the subject of formal trial. In an era when all the institutions of government are recorded for competition in the media, the judgment, to paraphrase United Church of Christ v. FCC, 359 F.2d 994, 1007 (1966), that "a history of...misconduct of the kind alleged would preclude, as a matter of law, the required finding that renewal...would serve the public interest" seems controlling.

1987 Petition against Scripps' KSHB-TV  
Incorporated by Reference

9. In offering the subject Petition to Deny, PacWest relies also on the showing made in the earlier Petition to Deny that was filed on November 19, 1987 in behalf of Weststar Communications against the renewal of Scripps station KSHB-TV, Kansas City, Missouri. PacWest incorporates that filing by reference herein and attaches hereto at Tab A a copy of the earlier Petition and associated documents.

Anticompetitive Conduct of Licensee (Recalled  
from 1987 filing against KSHB-TV Renewal

10. The early attempt by Scripps to lock out competition in the Sacramento cable market, (detailed in the 1987 Petition to



Deny) failed following a suit brought by Pacific West Cable

of local officials in order to win the cable award for Scripps (for a closer look at the "Gang," see Attachment V at Tab A). The jury, in its Special Verdict No. 12, found the franchising process to be an illegal scheme to trade a monopoly franchise in exchange for various payments. In paragraph d. of No. 12, the specific finding was that the City had engaged in a "sham" in order "to promote the making of cash payments and...'in kind' services by the company ultimately selected to provide cable television service to the Sacramento market." And, in paragraph e., the jury further found that the "sham" also was "used...to obtain increased campaign contributions for local elected officials." All 18 of the jury's special verdicts are submitted herewith at Tab A. But, because of its bearing and special significance, Special Verdict No. 12 is next fully reproduced here.

Jury's Special Verdict Finding Misconduct

13. The special verdicts returned by the jury are attached to the August 13, 1987 Memorandum Decision of District Court Judge Schwartz (at Tab A). This is Special Verdict No. 12:

SPECIAL VERDICT NO. 12

- a. IS "HEAD-TO-HEAD" COMPETITION AMONG CABLE TELEVISION SYSTEMS UNLIKELY TO OCCUR AND ENDURE IN THE SACRAMENTO MARKET?

YES \_\_\_\_\_ NO   X  

- b. IF YOUR ANSWER TO THE PRECEDING QUESTION IS "YES,"

ARE THERE FEWER ADVERSE EFFECTS ASSOCIATED WITH  
HAVING A SINGLE PROVIDER OF CABLE TELEVISION AS A  
RESULT OF THE RFP PROCESS THAN THERE WOULD BE IN  
THE ABSENCE OF THE RFP PROCESS?

YES \_\_\_\_\_ NO \_\_\_\_\_

c. WAS "NATURAL MONOPOLY" A SHAM USED BY DEFENDANTS AS  
A PRETEXT FOR GRANTING A SINGLE CABLE TELEVISION  
FRANCHISE?

YES  X  NO \_\_\_\_\_

d. WAS "NATURAL MONOPOLY" A SHAM USED BY DEFENDANTS TO  
PROMOTE THE MAKING OF CASH PAYMENTS AND PROVISION  
OF "IN KIND" SERVICES BY THE COMPANY ULTIMATELY  
SELECTED TO PROVIDE CABLE TELEVISION SERVICE TO THE  
SACRAMENTO MARKET?

YES  X  NO \_\_\_\_\_

e. WAS "NATURAL MONOPOLY" A SHAM USED BY DEFENDANTS TO

ment II to the incorporation by reference, p. 38) that the City's "interests were not 'unrelated to the suppression of expression'", and that:

...the defendants used cable television's allegedly naturally monopolistic nature as a pretext to obtain cash payments, in kind services and increased campaign contributions. This suggests that defendants sought to enhance the speech of some while burdening the expression of others-- a result which is contrary to first amendment values.

15. What, rhetorically, more markedly blemishes broadcast qualification than a judgment that first amendment values were defeated, that the speech of others was impeded. A search for easy exit to the dilemma will undoubtedly contend for the proposition that the Commission does not take cognizance of non-FCC misconduct involving antitrust or anticompetitive conduct unless it is adjudicated. It is, however, the resolute view of PacWest that for Commission purposes there has been an adjudication by an appropriate trier of fact, and that the misconduct of Scripps is established that it cooperated (influence peddling, cash payments, in kind services) with the franchising authority in Sacramento "to enhance the speech of some while burdening the speech of others."

Threat by Scripps to Retaliate against  
PacWest now more Clearly part of Pattern  
of Conduct to Run Off Competition

16. PacWest earlier thought that the evidence of the proposal of Scripps to retaliate for the court's 1987 decision was conclusive on the question of the integrity of Scripps. Thus, in

its filing against KSHB-TV. PacWest drew the Commission's attention

600, released July 31, 1990) inveighed against monopoly franchising, and the public speeches of Chairman Sikes reflect a deep aversion to local franchising practices that go beyond what should be only a limited involvement with police power concerns.

18. A counter, it perhaps may be expected, will seek refuge in contending that the Sacramento experience is the way it has always been done in the cable history. Single franchising, sure, but not the improper influence and conspiracy that characterized the Scripps activities in Sacramento. And the scornful conduct of Scripps in the original franchise award is part of a continuing pattern that is being repeated in the way Scripps has reacted to the new competition by PacWest in Sacramento.

Scripps Misconduct is Ongoing, did not Conclude  
with Failed Effort to Lock Out Competition Initially

19. By the time the franchising authority responded to the order of Judge Schwartz and issued a license to PacWest (authorizing construction in a defined and small area of the market), the Scripps system had been substantially built-out and was in full operation. As soon as PacWest commenced construction and marketing in the small area to which it was confined by its license, Scripps launched a campaign of harassment and cutthroat tactics that was more war and siege than competition. Thus, Scripps embarked on its second scheme, this time to deny to PacWest the right it had won to enter the market.

Conduct of Scripps in New Litigation

20. PacWest has current litigation under way alleging continuing effort by Scripps to foil PacWest's competition. A copy of the complaint in that action (U.S. District Court, Eastern

adorning recitations, the relevant provision is on page 9 of Exhibit III under "6. Universal and Uniform Service."<sup>2</sup> Having put up more than \$15 million for the release and no longer bound by customary franchise provisions against discriminatory pricing



this stage of the contest, it is submitted, would appear to be even less imaginable in view of the circumstance that the details of the recitation in Exhibit II are established by testimony and documents already public and at hand. For example, Scripps is charged with having offered a limited basic service at 25 cents per month. The evidence that Scripps employed so obviously predatory a price mechanism is available in its copyright reporting. Exhibit IV, herewith at Tab B, is the copyright Statement of Account for 1988/2 showing a 25-cent rate.

23. The \$15+ million that the Scripps cable system paid to the city had another monopoly-sealing feature. Soon after PacWest's successful litigation to open up franchising and to enter the market, a similar suit was launched in behalf of another competitor, Cable AmeriCal. As was the case for PacWest, a cable license for a small portion of the market was issued to Cable AmeriCal in August 1987. Exhibit II at Tab B, herewith, describes beginning at p. 25 how the Scripps system thereafter undertook